

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)	
)	
JOSEPH BUCKINGHAM and)	Bankruptcy Case No. 98-32548
BIRGIT BUCKINGHAM,)	
)	
Debtors.)	
_____)	
)	
MERCANTILE BANK N.A.,)	
)	
Plaintiff,)	
)	
vs.)	Adversary Case No. 99-3083
)	
JOSEPH BUCKINGHAM and)	
BIRGIT BUCKINGHAM,)	
)	
Defendants.)	

OPINION

This matter having come before the Court on a Motion to Set Aside Discharge filed by Plaintiff, Mercantile Bank N.A., on April 6, 1999; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

At trial on this matter, on July 12, 1999, the parties agreed that the material facts were not in significant dispute. As such, no testimony or documentary evidence was received by the Court. Rather, the parties made legal arguments, and the matter was taken under advisement for ruling on the Motion to Set Aside Discharge filed by the Plaintiff, Mercantile Bank N.A.

The material facts in this matter are in pertinent part as follows:

1. The Debtors filed for relief under Chapter 13 of the Bankruptcy Code on August 18, 1998.
2. The Debtors scheduled the Plaintiff herein, Mercantile Bank N.A., as a secured creditor on a 1998 Chevrolet extended cab pick-up truck. Debtors original Chapter 13 Plan valued the vehicle at \$24,000, with an estimated amount due on the contract of \$28,000.
3. On September 3, 1998, Mercantile Bank N.A. duly filed a secured claim based upon the contract amount for \$27,768.24.
4. Debtors' original Chapter 13 Plan was objected to by Creditor, General Motors Acceptance Corporation (GMAC), who also held a secured claim on another vehicle owned by the Debtors. On October 30, 1998, the Court sustained the objection of GMAC and granted the Debtors until November 30, 1998, to submit an amended plan.
5. On November 25, 1998, the Debtors filed a First Amended Chapter 13 Plan that provided for the surrender of the vehicles secured by Mercantile Bank N.A. and GMAC. The First Amended Chapter 13 Plan further provided that the claims of Mercantile Bank N.A. and GMAC would then be treated as unsecured claims based upon any deficiency after the sale of the vehicles.
6. Once again, GMAC objected to the confirmation of the Debtors' First Amended Plan on the basis that the plan was not sufficiently funded. However, Mercantile Bank N.A. did not file any objection or any response to the Debtors' First Amended Chapter 13 Plan.
7. Upon receipt of the Debtors' First Amended Chapter 13 Plan calling for the surrender of the collateral to Mercantile Bank N.A., the Chapter 13 Trustee immediately suspended payments to Mercantile Bank N.A. pending the filing of amended claims for any deficiency after sale of the relevant

collateral. At this time, Mercantile Bank N.A. was on notice that its claim would need to be amended based upon any deficiency after sale of its collateral. The suspension of payments by the Trustee was effective as to any distribution that would have occurred at the end of November 1998.

8. On or about December 18, 1998, Mercantile Bank N.A. obtained possession of the vehicle which served as its collateral.

9. On January 15, 1999, the Trustee mailed a Notice of Claims Filed to all creditors advising the creditors, including Mercantile Bank N.A., of the amount and status of pending claims.

10. On January 26, 1999, Debtors' First Amended Chapter 13 Plan was amended by interlineation in open Court to increase the amount of money paid into the plan in response to the objection which had been filed by GMAC. At no time did Mercantile Bank N.A. object to the confirmation of Debtors' original Plan or of the First Amended Chapter 13 Plan.

11. On January 28, 1999, an Order confirming the Debtors' First Amended Chapter 13 Plan was entered. It stated in part:

In the event that the number of creditors filing Proofs of Claim is less than the number of creditors in the debtor's bankruptcy petition, the Trustee is directed to distribute all of the proceeds of the debtor's plan to those creditors whose claims have been allowed, but not to exceed 100 percent of the amount of any claim.

12. In a letter dated February 18, 1999, Plaintiff, Mercantile Bank N.A., was advised by ADT Automotive, Inc. that the vehicle in question had been sold on February 10, 1999. At this point in time, Mercantile Bank N.A. was aware that there was a deficiency between the amount of the secured claim and the amount of the vehicle, and it subsequently determined that the deficiency was in the approximate amount of \$6,628.91. However, Mercantile Bank N.A. did not attempt to file a new proof of claim until March

8, 1999, some 103 days after the Debtors filed their First Amended Chapter 13 Plan, 80 days after Mercantile Bank N.A. recovered possession of the vehicle, and 41 days after confirmation of the First Amended Chapter 13 Plan. The Court also finds that the Proof of Claim for the unsecured deficiency balance filed by Mercantile Bank N.A. was not filed until some 26 days after the Bank was aware that the vehicle had been sold and that there would be a deficiency balance.

13. Prior to March 4, 1999, only two unsecured creditors filed claims in the Debtors' bankruptcy case. Since there were no priority creditors and payments had been suspended in November 1998, by the Chapter 13 Trustee, based upon the Debtors' First Amended Chapter 13 Plan, all payments made by the Debtors were paid to unsecured creditors on March 2, 1999, and both unsecured creditors who had previously filed claims were paid in full.

14. On March 4, 1999, the Chapter 13 Trustee notified the Court that the Debtors had completed their First Amended Chapter 13 Plan. Thus, on March 4, 1999, the Court entered an Order Discharging Debtor After Completion of Chapter 13 Plan.

15. On March 8, 1999, four days after entry of the Order Discharging Debtor After Completion of Chapter 13 Plan, Mercantile Bank N.A. filed its amended claim showing the deficiency balance of \$6,628.91.

16. The Order Discharging Debtor After Completion of Chapter 13 Plan entered on March 4, 1999, became a final and non-appealable order ten days after its entry, and it was not until April 6, 1999, that the instant Motion to Set Aside Discharge was filed by Mercantile Bank N.A. requesting that the Debtors' discharge be set aside, the case be reopened, and the Debtors make additional payments into the plan to be applied to the unsecured deficiency balance of the Bank.

In arguing that the Debtors' discharge should be set aside and the case reopened, counsel for the Bank stresses that, pursuant to 11 U.S.C. § 1328(b), notice and hearing should have been provided to the creditor prior to the time of the entry of the discharge. In considering this argument, the Court finds that 11 U.S.C. § 1328(b) is not applicable in this situation due to the fact that the unsecured creditors which had filed claims in the Debtors' bankruptcy were paid in full. Section 1328(b) is known as the "hardship discharge" section, and the Court can find no indication that this case would fall under the definition of a hardship discharge.

The fact situation presented by this case is highly unusual and certainly unfortunate for the Bank. However, in reviewing the undisputed facts, it is clear that the Bank was well aware of the suspension of payment on its secured claim, over three months prior to the discharge being entered in this case. Even so, the Bank never objected to either of the plans filed by the Debtors. Rather, the Bank waited until after the discharge had been entered to even file an amended claim showing its unsecured deficiency balance. The facts indicate that the Bank was clearly aware that it did have a deficiency balance prior to the time of the entry of discharge in this case, and that the Bank could have, at the very least, filed some type of pleading to protect its rights as an unsecured creditor. All in all, the Court must conclude that the Bank has failed on its Motion to Set Aside Discharge in that its arguments under § 1328(b) do not fit this fact situation. The only other provision which could have been used by the Bank is 11 U.S.C. § 1328(e), and, under this section, the Court can find no evidence that there was any fraud on the part of the Debtors herein in obtaining their discharge.

ENTERED: July 22, 1999.

/s/ GERALD D. FINES
United States Bankruptcy Judge